

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7466

Investigation into Petition Filed by Vermont Department)
of Public Service Re: Energy Efficiency Utility Structure)

Order entered: 9/3/2009

ORDER RE MOTION TO STRIKE REBUTTAL TESTIMONY

I. INTRODUCTION

In this Docket, the Vermont Public Service Board ("Board") is considering a change in the structure of Vermont's Energy Efficiency Utility ("EEU"). The Conservation Law Foundation ("CLF") has filed an objection to rebuttal testimony filed by International Business Machines Corporation ("IBM"). In this Order, we deny CLF's motion to strike the rebuttal testimony of IBM.

II. PROCEDURAL HISTORY

On June 26, 2009, Associated Industries of Vermont, IBM, CLF, Central Vermont Public Service Corporation, the City of Burlington Electric Department, the Vermont Department of Public Service ("Department"), Green Mountain Power Corporation, the Group of Municipal Electric Utilities¹, Vermont Electric Power Company, Inc., and Vermont Energy Investment Corporation ("VEIC") filed direct testimony in this docket.

On July 10, 2009, CLF filed an objection and a motion to strike the testimony of AIV and IBM. On July 24, 2009, AIV and IBM separately filed memoranda in opposition to CLF's motion to strike their testimony.

1. The Group of Municipal Electric Utilities include: Barton Village, Inc. Electric Department; Village of Enosburg Falls Water & Light Department; Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Company; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; and Swanton Village, Inc. Electric Department.

On July 31, 2009, CLF, the Department, IBM, and VEIC filed rebuttal testimony in this docket. On August 18, 2009, CLF filed an objection and a motion to strike the rebuttal testimony of IBM.

In an August 19, 2009, Order, the Board denied CLF's motion to strike the direct testimony of AIV and IBM.

On August 28, 2009, IBM filed memoranda in opposition to CLF's motion to strike its rebuttal testimony.

III. PARTIES' POSITIONS

CLF objects to and moves to strike the rebuttal testimony of Jonathan A. Aldrich on behalf of IBM. CLF contends that, as lay opinion testimony, IBM's rebuttal testimony fails to demonstrate that the opinions stated are rationally based on Mr. Aldrich's own perception or personal knowledge and neither the testimony nor any other evidence presented by IBM identifies the facts on which any of the opinions are based, and therefore his rebuttal testimony fails to meet the requirements of V.R.E. 602 and 701.²

In addition, CLF asserts that the rebuttal testimony of Mr. Aldrich presents no foundation to qualify its witness as an expert and allow admission of his opinion testimony under V.R.E. 702.³ CLF states that in its prefiled testimony, IBM failed to demonstrate that Mr. Aldrich is qualified as an expert and provided no information allowing the Board to determine that Mr. Aldrich has any particular experience or expertise regarding the delivery of energy efficiency services to utility customers. Additionally, CLF argues that the factual information included in IBM's reply memorandum to CLF's July 10 motion to strike is not evidence and cannot be relied

2. CLF cites *State v. Cate*, 165 Vt. 404, 409, 683 A.2d 1010, 1015 (1996) (rational perception is a foundational element of lay witness opinion testimony).

3. CLF cites *Trotier v. Bassett*, 174 Vt. 520, 523, 811, A.2d 166, 170 (2002) (the trial court must find an adequate foundation for the admission of expert testimony).

on as a foundation for expert testimony.⁴ CLF further contends that the unsupported allegations included in legal memoranda are insufficient to demonstrate Mr. Aldrich's expertise.⁵

Finally, CLF argues that because IBM does not provide "any basis on which Mr. Aldrich's statements are based," his rebuttal testimony, like his prefiled testimony, "does little more than state bald and conclusory positions of IBM on the testimony offered by other witnesses."

Therefore, CLF concludes that IBM fails to offer opinion testimony that would be helpful to the Board in its factfinding and should be excluded under V.R.E. 702 and 704.⁶

IBM requests that the Board deny CLF's motion. IBM contends that CLF has made identical assertions in its present motion as made in its previous motion to strike direct prefiled testimony, and consistent with the August 19 Order, the Board should deny the present CLF motion. IBM contends that its rebuttal testimony is proper because it is relevant and material and addresses issues raised by the various parties in their prefiled direct testimony. In addition, IBM asserts that it is significantly affected by the cost of the EEU and that its view of the proposal to change the EEU structure is important to facilitate the development of the record in this proceeding.

With regard to the expertise of its witness, IBM argues that its witness possesses the qualifications to provide expert testimony in this proceeding and IBM recites Mr. Aldrich's qualifications including current employment as the Site Energy Program Manager at IBM Vermont and active participation in EEU matters. IBM cites V.R.E. 702, Board precedent, and court precedent and contends that it is within the Board's discretion to determine whether

4. CLF cites *United States v. Williams*, 95 F.3d 723, 729 (8th Cir. 1996) (it is the burden of the party offering expert testimony to lay a foundation for its admission).

5. CLF cites *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2nd Cir. 1995) (mere conclusory allegations in legal memoranda are not evidence).

6. CLF cites *State v. Wigg*, 2005 VT 91, 179 Vt. 65, 889 A.2d 233 (testimony from a qualified expert in the form of an opinion is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue); and *United States v. Ellsworth*, 738 F.2d 333, 336 (8th Cir. 1984) (expert's "conclusory statement" properly excluded for lack of foundation).

Mr. Aldrich possesses the requisite qualifications to submit testimony and that such qualifications may arise from training, experience and/or education.⁷

In response to CLF's arguments under V.R.E. 602 and 701, IBM contends that Mr. Aldrich is a qualified expert witness, not a lay witness, and his testimony clearly demonstrates personal knowledge of the facts about which he is testifying, given his current employment, training, and experience. Moreover, IBM contends that the Vermont Supreme Court has recognized that the testimony of a lay witness may incorporate the witness's understanding of the law and that the Board has recognized the communication of any understanding of the law by a witness can often be useful and helpful in a proceeding.⁸

IV. DISCUSSION AND CONCLUSION

As discussed in the August 19 Order denying CLF's motion to strike direct testimony, pursuant to 3 V.S.A. § 810(1), in contested-case proceedings we generally follow the rules of evidence as applied by the superior courts in civil cases. The Vermont Rules of Evidence provide that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."⁹ In addition, as the Board found in Docket No. 6545, as an administrative tribunal the Board has "broad discretion as to the admissibility of all evidence, including expert testimony."¹⁰

In its motion to strike rebuttal testimony, as in its July 10 motion to strike direct testimony, CLF asserts that the testimony of Mr. Aldrich is not admissible as expert witness testimony. We disagree, for the same reasons set forth in our August 19 Order. Mr. Aldrich has gained relevant knowledge and expertise through his participation in EEU-related processes and has been helpful in identifying issues for the Board's consideration in this proceeding.

CLF argues that the prefiled testimony of IBM failed to demonstrate that Mr. Aldrich is qualified as an expert and provided no information allowing the Board to determine that

7. IBM cites Docket No. 6545, Order of February 21, 2002; *State v. Hicks*, 148 Vt. 459, 461 (1987); and *In Re D.C.*, 163 Vt. 517, 522 (1995).

8. IBM cites *Jordan v. Nissan America Inc.*, 2004 VT 27 (2004); and Docket 7373, Order of 8/21/09 at 2.

9. V.R.E. 702.

10. Docket 6545, Order on Motion to Strike, 3/21/02, at 2.

Mr. Aldrich has expertise regarding the delivery of energy efficiency services to utility customers. IBM's prefiled testimony identified Mr. Aldrich as IBM's site Energy Program Manager and provided a description of Mr. Aldrich's education and work experience. The prefiled testimony also provided a description of IBM's energy conservation program. Thus, we find that the prefiled testimony provides sufficient information to establish Mr. Aldrich's qualifications as an expert, and we will take any limitations in Mr. Aldrich's qualifications into account in determining the weight we give to his testimony.

We conclude, as we did in the August 19 Order, that Mr. Aldrich possess sufficient knowledge and expertise to address the issues set forth in his testimony. The extent of his expertise will affect the weight that the Board places on his testimony, as is the case with any witness offering expert opinions.

Because we have concluded that Mr. Aldrich qualifies as an expert, his rebuttal testimony is prohibited by neither V.R.E. 602 nor 701. V.R.E. 602, by express reference to V.R.E. 703, permits expert testimony that is not based on personal knowledge. V.R.E. 701 limits opinion testimony only by lay witnesses, not by expert witnesses.

For these reasons, we deny CLF's motion to strike rebuttal testimony.

So ORDERED.

Dated at Montpelier, Vermont, this 3rd day of September, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: September 3, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

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